89-489 (1)

No. 89-

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM B. SMITH,
PETITIONER,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY AND LINCOLN LABORATORIES,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the First Circuit Court of Appeals err when it failed to review under *Price Waterhouse*, the latest controlling decision of this court, clearly erroneous jury instructions given prior to said decision, despite a long line of decisions of this court which mandate such review, and despite both parties having called the court's attention to *Price Waterhouse*?

2. Did the First Circuit Court of Appeals err when it held, under its unique interpretation of Fed. R. Civ. P. 51, contrary to the opinions of all nine other circuits that considered the issue, that it would not review clearly erroneous jury instructions, despite specific objections thereto, because said objections were made immediately before, rather than after, the charge to the jury?

3. Did the First Circuit Court of Appeals err when it refused to review, under its plain error rule, clearly erroneous, highly confusing, jury instructions which very likely changed the outcome of the case, on the grounds that it did not find such change to result in "a clear miscarriage of justice" nor that it "seriously affected the fairness, integrity, or public reputation of judicial proceedings."

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I. Prior Decisions

The jury decision in this Civil Action 81-0058N was rendered on February 18, 1988 in favor of defendants Massachusetts Institute of Technology and its Lincoln Laboratories, hereafter referred to as "MIT" or "Lincoln Laboratory." The appeal to the United States Court of Appeals for the First Circuit, No. 88-1654, was denied by affirmation of the jury verdict on June 22, 1989, and is reported at 877 F.2d 1106.

II. The Grounds on Which the Jurisdiction of This Court is Invoked

1. The judgment sought to be reviewed was dated and entered June 22, 1989.

2. This court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit in this case by Writ of Certiorari under 28 U.S.C. 1254(1).

III. Statutes

1. Federal Rule of Civil Procedure 46.

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

2. Federal Rule of Civil Procedure 51.

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. But the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

IV. Statement of the Case

The action below was brought under the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) (ADEA). The plaintiff, William B. Smith, was a staff member at MIT's Lincoln Laboratory from December, 1954 to August 31, 1978, when he was terminated purportedly for performance reasons. Mr. Smith alleged that throughout the 1970's Lincoln Laboratory had a pattern and practice of discriminating against its older scientists and researchers in favor of younger employees and that as he got older he had been adversely affected by this policy and practice, eventually leading to his termination. (App. Vol. I, p. 4-8)

The defendant MIT Lincoln Laboratory is a research laboratory owned and operated by MIT in Lexington, Massachusetts. It does state-of-the-art research, primarily for the Defense Department. (App. Vol. II, p. 21D)

The plaintiff William B. Smith was born on January 9, 1929. In 1955 he received a Masters degree in engineering from MIT. He joined Lincoln Laboratory as a staff member in December, 1954, just before his graduation. Over the next twenty years Mr. Smith authored or co-authored thirty-one publications and scientific reports. While at Lincoln Laboratory Mr. Smith also was credited as being the first person to discover that the planet Venus rotates backwards. (App. Vol. II, pp. 136-140)

On June 25, 1979, Mr. Smith wrote to the U.S. Department of Labor alleging that there was a pattern and practice of age discrimination at Lincoln Laboratory. With the transfer of jurisdiction over the ADEA taking place on July 1, 1979, the Equal Employment Opportunity Commission eventually investigated Mr. Smith's charges. On December 31, 1980, the EEOC wrote to MIT stating that as a result of that investigation, it believed certain practices at MIT Lincoln Laboratory to be in violation of the ADEA and sought to begin conciliation efforts to eliminate any alleged unlawful practices. (App. Vol. I, p. 248)

On January 9, 1981, Mr. Smith filed a complaint based on these charges in the U.S. District Court for Massachusetts.

Mr. Smith alleged that MIT Lincoln Laboratory discriminated against its older staff members primarily through its performance and salary review system, the so-called "ladder ranking" system. Under the ladder ranking system all staff members were annually ranked A through E on a bell curve according to management's subjective view of their performance. The percentage size of a staff member's salary increase was based on this letter rating. Inasmuch as Lincoln Laboratory during the 1970's also had a forced turnover policy, this meant that persons low on the ladder also were encouraged or forced to leave. Mr. Smith alleged that older staff members were as a matter of fact and intent disproportionately at the bottom of the ladder and that they thereby received disproportionately low salary increases and were disproportionately exposed to termination. He asserted that his salary had in his latter years been depressed and his termination had been caused by this illegal practice. (App. Vol. I, p. 4-8)

Mr. Smith presented direct evidence of discrimination which resulted in the trial court giving a jury instruction regarding direct evidence. That instruction is not what Mr. Smith is appealing. His appeal relates to the rest of the trial court's instructions which so garbled the law that the jury could not reach a fair decision.

Plaintiff requested the following jury instruction:

> *Causation*
>
> In attempting to prove that the defendant intended to discriminate against him because of his age, the plaintiff must establish by a preponderance of the evidence that age was a "motivating factor" in the action taken by the defendant. The plaintiff need not establish that age was the sole or only factor motivating the defendant. Age may be one of a number of factors contributing to the defendant's action. Once plaintiff has proved this, the burden

> shifts to the defendant to prove that it would have taken the action against the plaintiff in any case because of a factor other than age.

(App. I 61). MIT, in turn, requested that the jury be instructed that:

> In order to prove that the plaintiff was discriminated against on the basis of age, the plaintiff must prove that age was not merely a factor, but must prove that age was the determinative factor in the decision to discharge. In other words, the plaintiff must show that "but for" his age he would not have been terminated.

(App. I 63). Smith filed a written objection to MIT's proposed instruction. (App. I 66).

The district court, in accordance with plaintiff's request, gave a *McDonnell Douglas* v. *Green* instruction.[1] (App. II 199-200). The court also incorporated the substance of a portion of plaintiff's requested instruction as follows:

> [P]laintiff must establish by a preponderance of the evidence that age was a motivating factor in the action taken by the defendant. The plaintiff need not establish that age was a sole or only factor motivating the defendant. Age may be one of a number of factors that contribute, however, to the defendant's action.

(App. II 201). There was no objection to this portion of the charge at this point. The jury then commenced deliberations.

[1] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The court generally instructed that the plaintiff had to prove that he was in the protected class; that he was qualified in the sense that he was doing the job well enough to rule out the possibility that he was fired for inadequate job performance; and that he was terminated. If plaintiff proved those factors, then defendant need only articulate a legitimate non-discriminatory reason. If defendant did articulate such a reason, the jury should find for defendant. However, if the plaintiff could show the reason was a pretext and that the real reason was age, the jury could find for plaintiff.

During the course of deliberations, which lasted one week, the jury made several written inquiries. The first occurred shortly after deliberations began, and essentially asked for a copy of the charge to the jury. (App. II 215). The court conferred by telephone with counsel, who had by that time left the courthouse, and thereafter gave the jury further instructions. In the context of this further instruction, the district court essentially gave the instructions previously requested by both the plaintiff and the defendant. The court instructed *inter alia:*

> I suggest to you that in addition to proving that he, Mr. Smith, was discriminated against on the basis of his age, Mr. Smith must prove that the alleged discrimination was purposeful or intentional. Mr. Smith must also prove that age was *the motivating or determinative factor* in MIT's decision to give him lower than expected salary increases or to discharge him *in the sense that but for MIT's discrimination* he would not have received lower than expected salary increases or have been discharged. Mr. Smith need not establish that the age was the sole or only factor causing MIT to act but that age was the motivating or determinative factor.
>
> *If the plaintiff has proved by direct evidence* that unlawful discrimination was a *motivating factor* in the employment decision, the defendant must prove that the same decision would have been made absent discrimination. (emphasis added)

(Tr. Vol. 16-45). The district court advised the jury that the complete charge had not been repeated, and that they should feel free to ask further questions.

Approximately two days later, the jury inquired concerning the application of the *McDonnell Douglas* standard. Specifically, the jury asked whether affirmatively answering the three queries under the standard meant that they should find

for the plaintiff, and vice versa. (Tr. Vol. 18 Exhibit) (Addendum A-1). In response to this inquiry, the court reiterated its earlier instruction containing the *McDonnell Douglas* criteria, and repeated the instructions quoted above. (Tr. Vol. 18-10).

Two days later, following an intervening instruction on the nature of deliberations, the jury sent out the following question: *Question #6*

> Your Honor,
> Count I.
> The defendant (sic) was intentionally
> discriminated against because of his age.
> Is age *the* determining factor
> or
> Is age *a* determining factor.
> We need clarification of the words the or a
> A = Being one of many
> The = Being the determing (sic) or only factor.

(App. II 118). The court reached Smith's counsel by telephone and discussed the question at length. Counsel made known his objection to the instruction which basically involved counsel's previously stated position that age had to be *a* motivating factor but not *the* motivating factor. The court did not agree with counsel. In response to the jury's inquiry, the court gave the following instruction:

> If the plaintiff succeeds in proving his prima facie case, defendant need only articulate a legitimate non-discriminatory reason for his treatment of Mr. Smith such as poor job performance or an inability to get along with others. Should MIT proffer a reason or reasons plaintiff must prove by a preponderance of the evidence that the legitimate nondiscriminatory reasons offered by MIT are not his true reasons but a cover-up or pretext for discrimination.

> The plaintiff Mr. Smith must prove that age was the motivating or determinative factor in MIT's decision to give him lower than expected salary increases or to discharge him *in the sense that but for* MIT's discrimination he would not have received lower than expected salary increases or had been discharged.
>
> Mr. Smith does not have to establish that age was the sole or only factor causing MIT to act but age was the motivating or determinative factor.
>
> If plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the defendant must prove that the same decision would have been made absent the discrimination. (emphasis added)

(App. II 224). Fifteen minutes after being given this instruction, the jury wrote yet another note asking for a written copy of the instruction, or that it be given again orally. (Tr. Vol. 20, Exhibit) (Addendum A-3). In response to that request, without further consultation with counsel, the district court sent the jury a handwritten copy of the instruction noted above which omitted the word *direct* from the last sentence. (Tr. Vol. 20, Exhibit) (Addendum A-4). Approximately three hours later, the jury returned a verdict in favor of defendant.

Mr. Smith appealed to the United States Court of Appeals for the First Circuit arguing, *inter alia*, that the jury instructions were wrong. During the pendency of that appeal, on the day of the oral argument, May 1, 1989, but before the decision was made on June 22, 1989, this court rendered its decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. ____, 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989). On May 10, 1989 both sides wrote to the First Circuit and called to the court's attention the decision in *Price Waterhouse*. The court's attention was called to the applicability of *Price Waterhouse* to the jury instructions which were the subject of the appeal.

The First Circuit failed completely to consider *Price Waterhouse* which does not appear at all in its opinion. It held that Smith failed to preserve his objections for appeal because he objected before the charge to the jury instead of afterward.

Finally, the First Circuit refused to review the case under its "plain error rule" despite the fact that the error very likely affected the entire outcome of the case because it did not feel that the error resulted in "a clear miscarriage of justice" nor that it "seriously affected the fairness, integrity, or public reputation of judicial proceedings."

Argument

I. THE FIRST CIRCUIT FAILED TO REVIEW THIS CASE UNDER *PRICE WATERHOUSE*, THE CONTROLLING DECISION OF THIS COURT

After the jury decision, but before the First Circuit decided the appeal in the instant case, this court rendered its decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989). *Price Waterhouse* thereby became the controlling decision in cases such as this one where sufficient direct evidence is presented at the trial for the judge to give a charge on direct evidence to the jury. Therefore the First Circuit was required to decide this case on the basis of *Price Waterhouse* rather than according to the law that existed at the time of the decision below. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109, 2 L.Ed. 49 (1801), *Bradley* v. *Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), *Hamling* v. *United States*, 418 U.S. 87, 102, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

Failure to object to an instruction at the time of trial does not foreclose review of the instruction under the new standard. *Brown* v. *Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979), *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978).

The decision of the First Circuit was based entirely on what the court saw as a "waiver of any objections to the instruc-

tions." Opinion at 7, annexed hereto as Appendix at p. A-6 (hereafter, "App. ____"). There is no consideration in the First Circuit's opinion of this court's decision in *Price Waterhouse*, despite the fact that counsel for both parties called the decision to the attention of the court in a timely manner. The obligation of the First Circuit to consider the appeal under *Price Waterhouse* is not dependent in any way on an objection having been made at trial timely or otherwise. Nor is it dependent on the plain error doctrine.

The First Circuit's failure to review this case under the standard of *Price Waterhouse* is clearly wrong. That error requires that this court review, or remand this case for reconsideration, in accordance with the standards enunciated in *Price Waterhouse*.

II. NO OTHER CIRCUIT COURT OF APPEALS AGREES WITH THE FIRST CIRCUIT'S HARSH INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 51 THAT, WITHOUT DEVIATION, OBJECTIONS TO A JURY CHARGE MUST BE MADE AFTER THE CHARGE IS GIVEN TO THE JURY IN ORDER TO PRESERVE THE OBJECTION FOR APPELLATE REVIEW.

As the cases cited below show, there is a very sharp split in the circuits over the interpretation of Rule 51. In fact, the outcome of this case clearly would have been in favor of petitioner if it had been argued in any of the other circuits, with the possible exception of the Fourth, Eleventh and Federal[2] Circuits which do not appear ever to have reached this question.

This case was decided by a jury against petitioner after the trial court gave an answer to a jury question (on the seventh day of its deliberations) over the strong objection of petitioner's counsel. That objection was made on the telephone after the court initiated the call from its chambers in Boston to Florida where counsel was on vacation. The court told counsel

[2] No case was found in the Federal Circuit on this issue possibly because most of that Circuit's cases do not arise from matters decided by a jury.

what it intended to say in response to the jury question. Counsel told the court exactly what his objection was. There is no question as to whether the court fully understood the objection. The court simply did not agree with the objection. After the telephone call was over, the court gave the jury the answer to its question, unchanged, despite counsel's telephone objection. The jury, which earlier that day had reported itself to be hopelessly deadlocked, reached its verdict a few hours later.

Petitioner filed a timely appeal to the United States Court of Appeals for the First Circuit arguing, *inter alia*, that the court's answer to said jury question was wrong and constituted reversible error. The First Circuit refused to reach the merits of said argument. Instead the court held that petitioner failed to meet the requirements of Rule 51 in that counsel's objection to the answer to the jury question was not preserved for appeal because it was not made *after the answer was given to the jury.*[3]

The First Circuit, contrary to the interpretation given to Rule 51 by nine other circuits, held that the language in Rule 51 that a party must object "before the jury retires to consider its verdict" means that the objection must be made *after* the instructions are given to the jury. App. p. A-5. Further, the court said that the strictures of Rule 51 must be followed without deviation. *Id.* There is neither reason, nor logic, nor justice behind such a formalistic, strict, and unfair interpretation of the rule. As the following analysis shows, no circuit agrees with the First Circuit.

A. *The Second Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Second Circuit holds that an objection is preserved for appeal regardless of whether it is made before or after the jury has been instructed, as long as the objection is enough to alert the judge to the specific issue to which counsel objects.

[3] Although the court made no record reference to the telephone conversation, the First Circuit accepted counsel's representation that there was one and as to what was said. App. p. A-5.

Kakavas v. *Flota Oceanica Brasileira, S.A.*, 789 F.2d 112 (2d Cir. 1986).

The Second Circuit clearly would have decided this issue in favor of petitioner.

B. *The Third Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Third Circuit holds that "there is no good reason for applying the rule so indiscriminately as to prevent counsel from pointing out on appeal matter which he did endeavor to identify to the trial court and which he had every reason to believe the court fully comprehended when granting an exception." *Bowley* v. *Stotlar & Co.*, 751 F.2d 641, 647 (3d Cir. 1985). The court went on to explain, "Rule 51, which requires an objection 'before the jury retires to consider its verdict' must be read with Rule 46, which provides that 'it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor. . . .'" *Id.* In *Bowley*, despite no post-charge objections (until after the verdict) the Third Circuit held that "it cannot seriously be contended that Bowley failed to preserve his objection. . . ." because he specifically called his objections to the court's attention and they were specifically rejected, *before the charge to the jury. Id.* Further, the Third Circuit holds that objections are automatically preserved to any part of the charge to the jury that is inconsistent with instructions previously requested and denied by the court, without any need to object after the charge is given. *Id.*

The Third Circuit clearly would have decided this issue in favor of petitioner.

C. *The Fifth Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Fifth Circuit holds that as long as the judge is aware of the objection before the jury is charged, there is no need for

counsel to object again after the charge to the jury. It specifically rejects the waiver argument, (stringently adhered to by the First Circuit). *Powell* v. *Rockwell International Corporation*, 788 F.2d 279 (5th Cir. 1986). "Because the record discloses that Rockwell made known its position to the judge that it was dissatisfied with the ... instruction, we find that it did not waive its right to preserve this claim at a later time." (Objections were raised at the charge conference but not after the charge was given to the jury) *Powell* at 285.

The Fifth Circuit clearly would have decided this issue in favor of petitioner.

D. *The Sixth Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Sixth Circuit comes closest to the First Circuit's interpretation of Rule 51. It holds that the objections should be made not only before the jury retires, but after the charge is given. *Murphy* v. *Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985). However, the Sixth Circuit allows an exception to the above interpretation where the objection would have been a mere "formality" under the circumstances. *Id.* at 346. Certainly the trial court in the instant case would have been surprised, perhaps even angered, if it received a later telephone call from petitioner's counsel to inquire whether the court had given the jury the answer it said it would. Clearly such a telephone call would have been a mere "formality" (and a waste of time) within the meaning of this exception as enunciated by the Sixth Circuit. It is obvious that the trial court, which had initiated the first telephone call from Boston to Florida to apprise counsel of the proposed answer to the jury's question, did not believe that a second telephone call was necessary, because the court did not make such a call. Obviously such a call would have been meaningless under the Sixth Circuit's interpretation of Rule 51, but was considered essential by the First Circuit under its interpretation of Rule 51. Such a formality makes no sense.

The Sixth Circuit clearly would have decided this issue in favor of petitioner.

E. *The Seventh Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Seventh Circuit holds that "whether the distinct statement of the matter to which counsel objects and the grounds of the objections are stated before or after the giving of the charge remains in the discretionary choice of the judge." *United States* v. *Hollinger*, 553 F.2d 535, 543 (7th Cir. 1977).

The Seventh Circuit previously had held that Rule 51 "necessitates deferring the process of formally stating their objections until the charge has been given in its entirety." *Hetzel* v. *Jewel Companies, Inc.*, 457 F.2d 527, 535 (7th Cir. 1972). But the Seventh Circuit was forced to reconsider and overrule said holding and stated that, "we think that a universal requirement of post-charge formalization [of objections] on the whole would impede rather than promote the efficient settling of instruction." *Hollinger*, *supra*, at 542. The Seventh Circuit went on to say that

> "imposition of a timeliness requirement beyond that directly mandated by Fed. R. Civ. P. 51 . . . impinges upon the broad discretion which trial judges would otherwise possess in formulating the means for achieving compliance with the rules. Further, a requirement that invariably pushes to a post-charge time frame the formal articulation of objections to tendered instructions devitalizes earlier on-the-record instructions conferences. Attorneys who realize that their remarks must be repeated in great detail after the charge might conceivably attach little significance to the earlier discussions to the detriment of the judge's understanding of a possible instructional defect. The earlier conference becomes something for less than a serious consideration, and the trial judge's

preparation for the actual charge can suffer in direct proportion.

"Ordinarily, trial judges will derive considerable benefit from a serious exchange of views by opposing counsel regarding the proper formulation of the applicable rules of law before they must charge the jury. Accordingly, we shall exercise our supervisory power by withdrawing our present requirement that the formal statement of objections be deferred to the post-charge time frame." *Hollinger, supra* at 542-543.

The Seventh Circuit clearly would have decided this issue in favor of petitioner.

F. *The Eighth Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Eighth Circuit holds that an objection is preserved for appeal if the objection is adequately called to the court's attention regardless of whether any further objection is made after the court's charge to the jury. *Gander* v. *Mr. Steak of Sun Ray, Inc.*, 774 F.2d 920 (8th Cir. 1985).

The Eighth Circuit clearly would have decided this case in favor of petitioner.

G. *The Ninth Circuit Disagrees with the First Circuit on its interpretation of Rule 51.*

The Ninth Circuit holds that "[i]n order to preserve for appeal an objection to a jury instruction . . . it is not necessary for a party to except or object (after the charge) 'if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing.'" *Brown* v. *Avemco Investment Corporation*, 603 F.2d 1367 (9th Cir. 1979) citing 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553 at 639-640 (1971).

The Ninth Circuit is highly critical of the position which the First Circuit adheres to regarding Rule 51. The Ninth Circuit pointed out that Rule 51 must be read with Rule 46 which provides that formal exceptions to rulings or orders of the court are unnecessary. *Id.* at 1370. The court held that further objection by counsel after the court understands the nature of the objection and has given its final opinion on it would be "not only unavailing but *wasteful of the court's time* and would be an *unnecessary elevation of form over substance. Id.* (emphasis added). The Ninth Circuit said that "Rule 51 was designed to prevent unnecessary new trials caused by errors in instructions that the district court could have corrected if they had been brought to its attention at the proper time. . . . *The rule was not intended to require pointless formalities." Id.* at 1371. (emphasis added). In addition, the Ninth Circuit said "[r]estating the identical point as an exception to the instruction would [be] useless" where the court's mind was clearly made up. *Id.*

In addition, the court said that in *Brown, supra* at 1371,

> ". . . the purpose of Rule 51 has been met. As discussed below, the district court was fully aware of plaintiff's position. . . . The court's refusal to give plaintiffs' proposed instructions on this issue represented a final decision by the court. To require plaintiffs to object after the instructions were given is to require *a pointless formality.* To preclude review of the court's instructions on this basis would *exalt form over substance with injustice to plaintiffs."* (emphasis added)

The Ninth Circuit holds that where a trial is so pervaded by an issue and it is clear that the court is thoroughly aware of the issue but has decided it against a party there is no need for the party to object to that part of the charge because such an objection *"would neither focus the issue further nor change the court's mind." Id.* at 1373. (emphasis added)

Finally, the Ninth Circuit pointed out that "[p]erhaps the most important line of cases from this circuit, however, is where this court found technical noncompliance with Rule 51 but proceeded to evaluate the merits of the appeal." *Id.* at 1375. The court then cited seventeen such cases.[4] One such case, *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959) was singled out in *Brown, supra* at 1375 for particular criticism because of its holding that a formal objection had to be made even though "counsel for Richfield knew the court's position and the court knew counsel's position." The *Brown* court said that such an interpretation was "inconsistent with the purpose of Rule 51 and can result in manifest injustice." The criticism was tempered somewhat by the fact that "[a]pparently even in *Richfield*, as in so many other cases, this court found that appellant had no right to review of the issue but justice required such review" and review was granted.

The Ninth Circuit clearly would have decided this issue in favor of petitioner.

H. *The Tenth Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The Tenth Circuit holds that when an objection properly calls the alleged error to the court's attention, the requirement of Rule 51 is met regardless of whether the objection is raised before the charge to the jury. *Weir* v. *Federal Ins. Co.*, 811 F.2d 1387 (10th Cir. 1987) (objection raised at the jury instruction conference).

The Tenth Circuit clearly would have decided this issue in favor of petitioner.

I. *The District of Columbia Circuit disagrees with the First Circuit on its interpretation of Rule 51.*

The District of Columbia Circuit holds that "in order to preserve for appeal an objection to a jury instruction . . . it is

[4] Research has revealed *no case* (through 1988) in which the First Circuit, after finding technical noncompliance with Rule 51, proceeded to evaluate the merits of the appeal.

not necessary for a party to except or object 'if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing.'" *Stewart* v. *Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977) (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553 at 639-640 (1971)). The D.C. Circuit said that "this view harmonizes the command of Rule 51 with the more flexible standards of Fed. R. Civ. P. 46 and recognizes that requiring counsel to engage in reiterative insistence does not serve the purposes of Rule 51 and may in fact impair justice by lengthening the time between the close of evidence and the time the jury begins deliberating." *Perkinson* v. *Gilbert/Robinson, Inc.*, 821 F.2d 686 (D.C. Cir. 1987) (objection to instructions sufficient when raised in trial brief and discussed at pre-trial conference). In *Perkinson* the D.C. Circuit said that, "it is plain from the record below that the court's pretrial conference denial [of the requested jury instruction] 'represented the trial judge's final opinion that [the] instructions should not be given and that further objection by plaintiff would have been not only unavailing but wasteful of the court's time.'" *Id.* at 694, *Stewart*, 553 F.2d at 140. Finally, the court said "[t]o hold that [plaintiff is] now precluded from complaining of the trial court's refusal to give these instructions would be an unnecessary elevation of form over substance." *Id.*

The District of Columbia Circuit clearly would have decided this issue in favor of petitioner.

J. *The First Circuit is out of step with the nine other circuits which have faced this issue.*

The logic of the First Circuit, as stated in its opinion in the instant case, App. p. A-6, for "firm adherence to Rule 51 is to give the trial court an 'opportunity to correct any errors before it is too late.'" citing *Kelley* v. *Schlumberger Technology Corp.*, 849 F.2d 41, 44 (1st Cir. 1988) (quoting *Brown* v. *Freedman Baking Co.*, 810 F.2d 6, 9 (1st Cir. 1987)).

By comparing the logic of the First Circuit with that of nine other circuits it becomes clear that all are in agreement that the purpose of the rule is to assure that objections are clearly made in a timely manner so that the trial court can make any changes it wishes before the jury retires for its deliberations. The reason why the First Circuit is so far out of step is that it fails to analyze the issue to the depth that the other circuits have reached. The logic of the other nine circuits cannot be faulted. It is clear that the First Circuit is wrong.

Most important, despite the overwhelming precedent of all those other circuits, the First Circuit resolutely refuses to change what it proudly proclaims to be "a long line of precedents," App. p. A-5, (citing, e.g., ten cases including one in the Tenth Circuit decided in 1966 by Aldrich, J. of the First Circuit, sitting by designation, which is no longer good law in that Circuit).

This court should not allow such a gross departure from the law in the rest of the circuits simply because the First Circuit is blind to this issue. Uniformity of decisions requires that *Certiorari* be granted in this case.

III. THE "PLAIN ERROR" EXCEPTION REQUIRED REVIEW EVEN IF THERE WAS A FAILURE TO COMPLY STRICTLY WITH THE REQUIREMENTS OF RULE 51, AND EVEN IF *PRICE WATERHOUSE* DID NOT CONTROL THIS CASE

The First Circuit recognizes a "plain error" exception to strict compliance with the requirements of Rule 51. *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966). The First Circuit holds that the "plain error" exception "should be confined to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976). In the instant case, as shown below, the error is very likely to have changed the jury's decision which surely affects the fairness of the trial. "It would indeed be a miscarriage of justice to let stand a legally erroneous instruction, central to

the plaintiff's theory of liability", and to the jury's articulated concern. *Amicus curiae* brief to the First Circuit by the United States Equal Employment Opportunity Commission, at p. 20.

In its initial written jury instructions respondent proposed that the trial court instruct the jury that "the plaintiff must prove that age was not merely a factor, but must prove that age was the determinative factor in the decision to discharge." Respondent's proposed instruction was based on *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). (App. Vol. I, pp. 63-64)

Petitioner objected to respondent's proposed instruction and proposed an instruction that the plaintiff must show that age was a motivating factor, but once this was shown "the burden shifts to the defendant to prove that it would have taken the action against the plaintiff in any case because of a factor other than age." Petitioner's proposed instruction was based on *Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987). (App. Vol. I, pp. 60-61, 66)

Prior to jury instructions being given the parties again argued to the court as to whether *Fields* was applicable to this case and what the appropriate instruction should be. (App. Vol. II, pp. 191-196)

In the initial instructions given before the jury retired on February 11, 1988, the trial court stated that "plaintiff must establish by a preponderance of the evidence that age was a motivating factor in the action taken by the defendant. The plaintiff need not establish that age was a sole or only factor motivating the defendant." (App. Vol. II, p. 201)

The jury then retired. Seven days later Thursday, February 18, 1988, the jury submitted the following question in writing to the trial court:

> "Is age *the* determining factor or is age *a* determining factor? We need clarification of the words the or a. A = Being one of many. The = Being the Determining or only Factor." (emphasis in original jury note) (App. Vol. I, p. 118)

Judge Nelson, after conferring with counsel by telephone and getting the same requests and objections as stated above (App. Vol. I, pp. 234-235, 243-244), then gave the following instruction to the jury:

> "If the plaintiff succeeds in proving his prima facie case, defendant need only articulate a legitimate nondiscriminatory reason for his treatment of Mr. Smith such as a poor job performance or an inability to get along with others. Should MIT proffer a reason or reasons plaintiff must prove by a preponderance of the evidence that the legitimate nondiscriminatory reasons offered by MIT are not his true reasons but a cover-up or pretext for discrimination.
>
> *The plaintiff Mr. Smith must prove that age was the motivating or determinative factor in MIT's decision to give him lower than expected salary increases or to discharge him in the sense that but for MIT's discrimination he would not have received lower than expected salary increases or had been discharged.*
>
> Smith does not have to establish that age was a sole or only factor causing MIT to act but age was the motivating or determinative factor.
>
> *If the plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the defendant must prove that the same decision would have been made absent the discrimination.*" (Addendum, pp. 40-42) (emphasis added)

Three hours after these instructions were given the jury returned a verdict for MIT. On its face these jury instructions are hopelessly confusing. The jury wanted to know specifically whether discrimination based on age had to be the determining factor in the employment decision or whether it could be a determining factor. In response to this simple question the court repeated the complex instructions as stated above. A review of those instructions shows that the court told the jury

both that plaintiff "must prove that age was *the* motivating or determinative factor" and also told the jury that plaintiff need only prove that age was "*a* motivating factor" in order to require defendant to prove that the same decision would have been made absent the discrimination.

The jury obviously felt that age was one factor among others and was trying to find out whether, given the mixed motives, they should find for plaintiff because age played *a* role in the decision or whether they should find for defendant because age did not play *the* only role in the decision.

The court's instruction in answer to the jury's question that:

> The plaintiff Mr. Smith must prove that age was *the* motivating or determinative factor in MIT's decision to give him lower than expected salary increases or to discharge him in the sense that *but for* MIT's discrimination he would not have received lower than expected salary increases or had been discharged. (emphasis added)

is clearly wrong. This instruction directly contradicts the First Circuit's holding in *Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987) in which the court said:

> The question, which is one of first impression in this circuit, is whether a plaintiff who has proved by direct evidence that unlawful discrimination was a motivating factor in the employment decision must also prove that it was a "but for" cause. Based on our review of the law, we conclude that the *McDonnell Douglas* format should not be slavishly followed and that, after such proof by the plaintiff, the defendant must prove that the same decision would have been made absent the discrimination.

Nor is the error corrected by the later instruction that:

> If the plaintiff has proved by *direct evidence* that unlawful discrimination was a motivating factor in an employ-

> ment decision, the defendant must prove that the same decision would have been made absent the discrimination." (Addendum, pp. 40-42) (emphasis added)

because the first instruction should not have been given and served to confuse the issue. Even if it was correct to give both instructions, the jury was given no guidance as to when the one standard was to be applied and when the other was applicable.

Plaintiff was clearly entitled to have the jury instructed as to the standard applicable to a case involving direct evidence of discrimination. A party is entitled to have the jury instructed on his theory, if legally correct and there is evidence to support it. *Des Moines Water Board Works Trustees* v. *Alford Burdick & Howson*, 706 F.2d 820 (8th Cir. 1983). In this case, plaintiff presented substantial direct evidence of discrimination. Plaintiff testified that he was told not to expect to retire from Lincoln Laboratory and that "new" people entering the ladder would push other people out. Other staff members testified about age-discriminatory statements made to them by managers. Several older technical staff members testified that they were told point blank that they were being terminated because of their age and because very few technical staff members were retired from the lab. (App. II 56-57, 64, 109, 142, 147). Evidence was also presented that the age "consciousness" pervaded the atmosphere at the Lincoln Laboratory and that the management was clearly opposed to retaining older persons in the technical staff member position. Their belief was that it was better to be a "younger" lab (one with young staff) and that engineers burned out. There was testimony that the director of the lab told the staff, "I do not care to preside over an aging laboratory." The testimony of the assistant director of the lab clearly suggested a built-in age bias — either the person was a "comer" in the eyes of his supervisor or he was not. Moreover, evidence was presented of MIT's candid admission that it used age in salary administration prior to the imple-

mentation of the ADEA but lack of knowledge as to when the ADEA was implemented. (App. II 34-35, 43-44, 64, 76-77, 118).

The court gave the standard instruction under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) required by a disparate treatment case. Then the court added a standard mixed motive instruction under its decision in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), which requires that age be *the* motivating factor in the decision to terminate plaintiff's employment. Finally the court added a mixed motive, direct evidence, instruction which requires the plaintiff to show that age was *a* motivating factor. This mixture of instructions simply did not, and could not, clarify whether age had to be *a* motivating factor or *the* motivating factor. They were wrong and under the plain error rule should have been reviewed by the First Circuit despite the court's holding that plaintiff's counsel waived the right to review because he was not in the courtroom and therefore did not object to the answer to the jury's question after it was given to the jury. Further, they may, and should, be reviewed by this court under the plain error rule of this court, Rule 34.

It is noteworthy that the First Circuit considered but refused to apply its plain error rule, App. p. A-7. Research has revealed no case (through 1988) in which the First Circuit ever applied the plain error rule to consider a case after it had determined that the issue was precluded by a failure to comply strictly with the requirements of Rule 51.

Conclusion

Because the First Circuit neither considered nor applied the controlling decision of this court in *Price Waterhouse* this case must be reviewed or, at least, remanded for reconsideration.

Alternatively, petitioner respectfully requests that this court grant *certiorari* to review the decision of the First Circuit because it is completely out of line with the rest of the Circuit Courts of Appeal regarding its interpretation of Rule 51 of the

Federal Rules of Civil Procedure. Further, the First Circuit will need the guidance of this court regarding jury instructions in a "direct evidence" case under *Price Waterhouse*.

As the outcome in this case obviously turned on the instructions to the jury, the loss of the case by petitioner clearly resulted in injustice to him if those jury instructions were wrong. Therefore the First Circuit should have reviewed the case under its plain error rule despite its ruling that the issue was waived for failure to comply strictly with the requirements of Rule 51. The Ninth Circuit's position on the plain error rule cries out to be heard at this point. It said: "[p]erhaps the most important line of cases from this circuit, however, is where this court found technical noncompliance with Rule 51 but proceeded to evaluate the merits of the appeal." *Brown* v. *Avemco Investment Corporation*, 603 F.2d 1367, 1375 (9th Cir. 1979). And in a comment applicable to the First Circuit's strict adherence to Rule 51 and its refusal to reach the issue under the plain error rule in the instant case, the Ninth Circuit said that such an interpretation was: "inconsistent with the purpose of Rule 51 and can result in manifest injustice." *Id.* Manifest injustice resulted in this case. It must be reversed.

Further, the issue of what constitutes an appropriate instruction to the jury in an age discrimination case, where a substantial amount of direct evidence of age discrimination and animus has been presented will significantly effect enforcement of the ADEA. *Amicus curiae* brief in the instant case to the First Circuit by the United States Equal Employment Opportunity Commission at page one. Therefore, review of this case by this court furthers the public interest and public policy of the United States in the fair interpretation of the ADEA.

Respectfully submitted,

NORMAN JACKMAN, ESQ.
Attorney for Petitioner

Dated: September 19, 1989

APPENDIX

United States Court of Appeals
For the First Circuit

No. 88-1654

WILLIAM B. SMITH,

PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*].

Before
BOWNES and BREYER, *Circuit Judges*,
and GRAY,* *Senior District Judge*.

Scott A. Lathrop, P.C., for appellant.
Estelle D. Franklin, *Charles A. Shanor*, General Counsel, *Gwendolyn Young Reams*, Associate General Counsel, and *Lorraine C. Davis*, Assistant General Counsel, on brief for the Equal Employment Opportunity Commission, Amicus Curiae.
Robert E. Sullivan with whom *Judith A. Malone*, *Margaret Wood Hassan* and *Palmer & Dodge* were on brief for appellees.

JUNE 22, 1989

BOWNES, *Circuit Judge*. Plaintiff-appellant, William B. Smith, appeals a jury verdict finding that defendants-appellees, Massachusetts Institute of Technology and MIT Lincoln Laboratory, did not violate the Age Discrimination In Em-

*Of the Central District of California, sitting by designation.

ployment Act, 29 U.S.C. §§ 621-634, by giving him disproportionately low salary increases and subsequently terminating his employment. Plaintiff raises three issues on appeal: erroneous jury instructions; the district court's refusal to strike certain evidence; and the court's exclusion of certain evidence.

Defendant claims that plaintiff waived his right to object to the jury instructions by not following the strictures of Fed. R. Civ. P. 51. We agree. We first deal with the waiver question.

I. Jury Instructions — Waiver

Fed. R. Civ. P. 51 provides in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Because the facts bearing on the rule are somewhat unusual, we state them in detail. The trial took 16 days. On the 16th day, February 11, 1988, the court instructed the jury. Counsel for the plaintiff objected to one part of the instructions. Defense counsel agreed that the objection was well taken and the court give an additional instruction, correcting its previous mistake. No further objections were taken. The jury began deliberations at 12:35 p.m.

After the jury retired for deliberations, plaintiff's counsel informed the court that he would be out of state all of the following week. He requested that judgment not be entered until February 22, so he would have time after he returned to file any motions that might be necessary. Defense counsel did not object and the court granted the request. February 11, the day the case went to the jury, was a Thursday.

Sometime in the early afternoon of February 11, the jury submitted two questions to the court. At 3:05 p.m. the jury returned to the courtroom for further instructions in response to the question. Before instructing the jury the court stated:

> Counsel would ordinarily be here but because I released them to go back to their offices and so forth, I

> thought it would take up a considerable amount of time to wait for them to return. And they have agreed that I can instruct you provided I understand the question clearly. Okay. And it is a matter of record what I say, so they're satisfied with this process.

Among the instructions given was the following:

> I suggest to you that in addition to proving that he, Mr. Smith, was discriminated against on the basis of his age, Mr. Smith must prove that the alleged discrimination was purposeful or intentional. Mr. Smith must also prove that age was the motivating or determinative factor in MIT's decision to give him lower than expected salary increases or to discharge him in the sense that but for MIT's discrimination he would not have received lower than expected salary increases or have been discharged. Mr. Smith need not establish that the age was the sole or only factor causing MIT to act but that age was the motivating or determinative factor.

Since counsel were not present, no objections to any of the supplementary instructions were taken.

The jury failed to return a verdict on the following day, Friday, February 12.

The next record of any proceedings is for Tuesday, February 16. Another jury question had been submitted to the court. Before instructing the jury, the court stated:

> I have a jury question. It is the latest question referenced to me and it is now marked juror question No. 5, and filed this day February 16th. I have called counsel, and counsel representing defendant is present. Counsel representing plaintiff is unavailable. But my understanding is that he chooses not to be here, and again I must continue without his presence. That's a fair statement.

The court in instructing the jury stated, *inter alia:* "Mr. Smith need not establish that the age was the sole or only factor causing MIT to act but that age was a motivating determinative factor." No verdict was returned on February 16.

On February 17, a problem arose when one of the jurors indicated that the jury was hopelessly deadlocked and he had to return to work within a few days. Defense counsel was present, having been notified by the court that there was a jury problem. The court noted, "I have notified the other office but counsel for the plaintiff is not available." The court discussed the problem on the record. Before the jury came in, it expressly asked defense counsel to sit in the spectator section, "because I don't want to emphasize his [counsel for plaintiff] absence." No supplementary instructions were given. No verdict was returned on February 17.

On February 18, the jury asked the court another question. The court gave further supplementary instructions which contained the following:

> The plaintiff Mr. Smith must prove that age was the motivating or determinative factor in MIT's decision to give him lower than expected salary increases or to discharge him in the sense that but for MIT's discrimination he would not have received lower than expected salary increases or had been discharged.

Although plaintiff's counsel was not present, he specifically objects to this instruction. He states in his reply brief at page 4:

> On February 18, 1988, the trial court gave the jury instruction in question, which was in response to Jury Question No. 6. Prior to giving the jury instruction, the trial court had a telephone conference with counsel, which lasted on the order of one half hour, as to their objections and comments. Counsel for Smith strongly opposed any instruction based on *Loeb* v. *Textron*, 600 F.2d 1003 (1st Cir. 1976). Despite hearing this objection, the trial court indicated that it would give such an instruction. And it gave such an instruction.

No mention is made by plaintiff of the other two supplementary instructions similar to the one given on February 18.

This circuit has consistently held that the strictures of Rule 51 must be followed without deviation. In *McGrath* v. *Spirito*, 733 F.2d 967, 969 (1st Cir. 1984), we held:

> A trial court's statement after the charge that objections made prior to it will be saved does not absolve an attorney from following the strictures of the rule. Objections cannot be carried forward. The rule is binding on both the court and attorneys and neither can circumvent it.

This admonition was repeated in *Ouimette* v. *E.F. Hutton & Co., Inc.*, 740 F.2d 72, 76 (1st Cir. 1984). Although the court made no record reference to the telephone conversation, we accept counsel's representation that there was one and as to what was said. But regardless of any assurances the court may have implied as to saving objections to the proposed instruction,[1] it had no authority to allow counsel to deviate from or circumvent the rule.

We have construed the Rule's requirement that a party must object "before the jury retires to consider its verdict" to mean that the objection must be made *after* the instructions are given to the jury:

> Even if plaintiff's requested instruction had been proper, counsel failed to raise that objection again subsequent to the actual charge. According to a long line of precedents in this circuit, such an omission constitutes waiver of the objection pursuant to Federal Rule of Civil Procedure 51. *See, e.g., Brown* v. *Freedman Baking Co., Inc.*, 810 F.2d 6, 9 (1st Cir. 1987); *Coy* v. *Simpson Marine Safety Equipment, Inc.*, 787 F.2d 19, 26 (1st Cir. 1986); *Emery-Waterhouse Co.* v. *Rhode Island Hosp. Trust Nat'l Bank*, 757 F.2d 399, 411 (1st Cir. 1985); *McGrath* v. *Spirito*, 733 F.2d 967, 968-69 (1st Cir. 1984); *Monomoy Fisheries, Inc.* v. *Bruno & Stillman Yacht Co.*, 625 F.2d 1034, 1036 (1st Cir. 1980); *Carrillo* v. *Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir. 1975); *United States* v. *Taglianetti*, 456 F.2d 1055, 1056-57 (1st Cir. 1972); *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970, 976 (1st Cir. 1972); *Dunn* v. *St. Louis-San Francisco Ry.*

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[1] There is nothing in the record suggesting that any such assurances were made.

> *Co.*, 370 F.2d 681 (10th Cir. 1966) (Aldrich, J., sitting by designation); *Marshall* v. *Nugent*, 222 F.2d 604, 615 (1st Cir. 1955).

Wells Real Estate v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.) (footnote omitted), *cert. denied*, 109 S.Ct. 392 (1988). The reason for "firm adherence to Rule 51 is to give the trial court an 'opportunity to correct any errors before it is too late.'" *Kelley* v. *Schlumberger Technology Corp.*, 849 F.2d 41, 44 (1st Cir. 1988) (quoting *Brown* v. *Freedman Baking Co.*, 810 F.2d 6, 9 (1st Cir. 1987)).

The failure of plaintiff's counsel to be present when the third set of supplementary instructions was given to the jury constituted a waiver of any objections to the instructions. And the waiver could not be cured by telephonic objection to the proposed instruction beforehand. Supplementary instructions in response to jury questions may be just as important as the initial charge, if not more so. It is the duty of counsel to be either in the courtroom during jury deliberations or available on short notice, in the event a problem arises. A jury case is not over until the verdict is finally returned. If supplementary instructions become necessary and counsel is not present, this constitutes a waiver of any objections to the supplemental instruction. Lawyers cannot be compelled to be present during jury deliberations but if they chose to neglect their duty, they take their chances on what is said and done by the court in their absence.

There is a "plain error" exception for failure to follow Rule 51, but its application is restricted:

> However, the plain error "should be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice." *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966). We have adopted the standard for plain error in the Rule 51 context expressed by professors Wright and Miller: "'If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has

> seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) (quoting 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2558, at 675 (1971)).

Wells Real Estate v. *Greater Lowell Bd. of Realtors*, 850 F.2d at 809. We have read carefully the entire charge and all the supplemental instructions. Considering the instructions as a whole, as we must, we find that the instruction to which plaintiff assigns error did not result in "a clear miscarriage of justice" nor has it "seriously affected the fairness, integrity, or public reputation of judicial proceedings." In fact, we are not sure that the instruction was error at all.

II. The Court's Refusal To Strike Certain Evidence

Plaintiff claims that he was not furnished with the data base that formed the core of the testimony of defendant's expert, Dr. Herbert Weisberg. Defendants did file a proposed list of exhibits which included Dr. Weisberg's report and related charts, on which plaintiff relied in preparing for cross-examination of the expert. Plaintiff alleged that Dr. Weisberg testified on the basis of a statistical analysis and charts that were not part of his report. According to plaintiff, defendant Lincoln Laboratory furnished Dr. Weisberg with a complete data base on employee terminations but did not provide this information to plaintiff, although he had asked for all such information during discovery. It is plaintiff's contention that the failure of defendant Lincoln Laboratory to apprise him that Dr. Weisberg would testify mainly about the statistical relationship between age and involuntary terminations violated Fed. R. Civ. P. 26(e)(1)B and that it was error for the court to refuse to strike Weisberg's testimony.

The court heard the motion to strike the expert testimony after the evidence closed. Defendant asserted that throughout the discovery and production period plaintiff was given "all information requested in the discovery process relating to data

concerning employees." Defense counsel offered to prove this through testimony of Attorney Mary Marshall, counsel for MIT throughout the discovery and production period. Defense counsel also claimed that a report covering Weisberg's own preparation was furnished plaintiff's counsel on December 8, and a subsequent revision was also given him. When plaintiff's counsel stated that he had not received this report, defense counsel offered to prove that it was provided. Defense counsel made two further assertions:

> that the underlying data from which Mr. Weisberg made the calculations was either available to Mr. Marx [plaintiff's expert] or was not made available pursuant to the rulings on discovery, the positions taken on discovery.
>
> Finally, Mr. Weisberg has been held out as being available for depositions throughout the whole process, and his deposition was never taken.

There was further discussion and argument between opposing counsel. Plaintiff's counsel insisted that he did not know that the data on which defendant's expert relied was different from the data furnished plaintiff during discovery until he elicited that information from Weisberg on cross-examination.

Fed. R. Civ. P. 26(e)(1)(b) provides:

> (e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

In *Johnson* v. *H.K. Webster, Inc.*, 775 F.2d 1 (1st Cir. 1985), we faced a similar issue and discussed the scope and purpose of the Rule at length. We noted that the purpose of the rule was

to alleviate "the heavy burden placed on a cross-examiner confronted by an opponent's expert whose testimony had just been revealed for the first time in open court." *Id.* at 7. We pointed out that the rule was designed to give the cross-examiner advance preparation and thus promote effective cross-examination, and that to make the rule effective, the Advisory Committee Note calls for sanctions by the court including exclusion of evidence, granting a continuance or other suitable action. We emphasized that the rule should not be read mechanically, but construed in light of its purposes to narrow the issues and eliminate surprise. *Id.*

Our review of the pertinent case law led us to conclude that "the emphasis in evaluating the decision to admit testimony over a Rule 26(e) objection entails careful balancing. Trial and appellate courts should look to the conduct of the trial, the importance of the evidence to its proponent, and the ability of the defendant to formulate a response." *Id.* at 8. Noting that one of the sanctions is granting a continuance, we stated: "Courts have looked with disfavor upon parties who claim surprise and prejudice but who do not ask for a recess so they may attempt to counter the opponent testimony." *Id.* (citations omitted). In *Laaperi* v. *Sears, Roebuck & Co., Inc.*, 787 F.2d 726, 733 (1st Cir. 1986), we followed the teachings of *Johnson* and held that the trial court did not abuse its discretion in refusing to strike the testimony of an expert.

We have examined carefully the direct and cross-examination of defendant's expert, Dr. Weisberg, giving special attention to the cross-examination. Several things stand out. One, the cross-examination of Weisberg was comprehensive and thorough. It is obvious that plaintiff's counsel was well prepared. Two, the data about which plaintiff complains did not result in an abrupt volte-face in the expert's testimony. This is not the situation of a new or alternate theory being offered for the first time at trial. In fact, when asked by plaintiff's counsel what impact the data would have on one of the chief exhibits (Exhibit 70), the expert replied that he did not know, specif-

ically but, "[i]n general terms I would expect it to have a small impact." Three, the direct and cross-examination reveals that the data at issue was not the main basis for the expert's conclusions. It merely added to the statistical picture and made it more complete. And finally and most importantly, plaintiff's counsel did not ask for a recess or continuance so that he could examine the undisclosed data. Indeed, no objection was made at the time the disclosure was elicited. The failure to object, of course, runs afoul of the timely objection rule.[2] The motion to strike was not made until after the evidence was closed.

Considering all of the circumstances, we cannot find that the trial court abused its discretion in refusing to strike the expert's testimony.

III. The Evidentiary Exclusion

The final issue is whether the district court erred in excluding three reports contained in the investigation file of the Equal Employment Opportunity Commission (EEOC). After plaintiff filed a charge of age discrimination with the EEOC, the agency began an investigation of defendant Lincoln Laboratory. Equal Opportunity Specialist, John J. Martin, was the assigned investigator. Martin made three reports to his supervisor, Richard W. Trucchi. The reports are dated January 15, June 25 and December 19, 1980, and total twenty pages. The reports are critical of Lincoln Laboratory's treatment of its older employees. The January 15 report contains statements of 12 former employees to the effect that age was a factor leading to their termination or the main reason for it. This eight-page report concludes as follows: "It appears that

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[2] Fed. R. Evid. 103 provides in pertinent part:

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

there is a reasonable basis for concluding that the Respondent [Lincoln Laboratory] maintains policies and practices that discriminates [sic] against employees on the basis of their age in violation of the ADEA." The four-page June 25 report recommends that a questionnaire be sent to those persons terminated in 1978 and 1979 who were in the protected age group. The final eight-page report focused on Lincoln Laboratory's treatment of plaintiff. The report ends with a recommendation for "a finding that MIT Lincoln Laboratory violated the ADEA in retaliating against Mr. Smith."

On December 31, 1980, Martin's supervisor, Trucchi, wrote a letter to the MIT director of personnel advising him that as a result of the EEOC's investigation, "certain practices of [Lincoln Laboratory] are believed to be in violation of the Age Discrimination Act of 1967, as amended."

As part of its motion to exclude the investigative reports defendants included an affidavit of Charles Looney, Area Director of the EEOC. The affidavit states in pertinent part:

> It is EEOC policy that this type of internal memoranda are not disclosable to anyone under any circumstances. As far as I know, it has never been EEOC policy to release such documents. I do not know why they were released in this case. Such memoranda do not constitute any official findings by the EEOC.

We now examine the pertinent law. Fed. R. Evid. 803(8)(c) provides in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> ...(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The most recent United States Supreme Court case touching on the matter is *Beech Aircraft Corp.* v. *Rainey*, 109 S.Ct. 439 (1988). The Court held that "factually based conclusions or

opinions are not on that account excluded from the scope of Rule 803(8)(c)." *Id.* at 446. It pointed out that "a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof — whether narrow 'factual' statements or broader 'conclusions' — that she determines to be untrustworthy.[11]" *Id.* at 448-49. Footnote 11 refers to the Advisory Committee's proposed standard for determining trustworthiness.

There are two cases from this court bearing directly on the issue. In *Hilton* v. *Wyman-Gordon, Co.*, 624 F.2d 379, 383 (1st Cir. 1980), we stated: "Moreover, as this case makes abundantly clear, while EEOC findings in general may be significant evidence, their probative force in individual cases varies considerably and is left to the determination of the trial court." In *Blizard* v. *Fielding*, 572 F.2d 13, 16 (1st Cir. 1978), we stated: "While recognizing that findings by the EEOC are entitled to great deference by the district court, we cannot say that a court is obliged to refer to those findings in its opinion."

We interject here that the reports by Martin were not findings by the EEOC. The only official finding of the agency was the statement in Trucchi's letter to the personnel director of MIT that certain practices of the defendants were believed to be in violation of the ADEA.

Our canvass of the other circuits reveals general agreement that the question of admissibility is one for the discretion of the district court. *Tullos* v. *Near North Montessori School*, 776 F.2d 150 (7th Cir. 1985), was an appeal from a bench trial decision finding no discrimination based on national origin. One of the issues on appeal was the refusal of the court to admit the entire investigative file. The court stated:

> Generally, the courts of appeals are in agreement that it is not error to exclude the investigator file of the EEOC in order to insure a fair and independent determination of the facts by the court. As one court has noted, the EEOC file is a "mish-mash of self-serving and hearsay statements and records; . . . justice requires that the testimony of the

> witnesses be given in open court, under oath, and subject to cross examination." *Gillin* v. *Federal Paper Board Co.*, 479 F.2d 97, 99 (2d Cir. 1973) (quoting the district court's opinion, 52 R.F.D. 383, 385 (D.Conn. 1970)).
>
> A rule of *per se* admissibility of the investigative file would clearly undercut the district court's function as independent fact-finder. The better approach is to permit the district court to determine, on a case-by-case basis, what, if any, EEOC investigator materials should be admitted at trial.

Id. at 154. (footnote omitted). In *Moore* v. *Devine*, 767 F.2d 1541 (11th Cir. 1985), *modified on other grounds*, 780 F.2d 1559 (11th Cir. 1986), a case involving alleged racial discrimination, the court cited with approval our holdings in *Blizard* v. *Fielding* and *Hilton* v. *Wyman-Gordon, Co.* The Fifth Circuit held, in an alleged racial discrimination case, "that the trial court's decision to exclude testimony by the EEOC investigator as to his evaluation of facts already in evidence was not an abuse of discretion." *Dickerson* v. *Metropolitan Dade County*, 659 F.2d 574, 579 (5th Cir. 1981). And in a jury case under Title VII, the Fourth Circuit affirmed the refusal of the district court to admit the EEOC records into evidence, stating that even in cases where the records may be admitted, "the admission of such records is discretionary with the District Court." *Cox* v. *Babcock and Wilcox Company*, 471 F.2d 13, 15 (4th Cir. 1972). We have found no cases, and counsel has cited none, mandating the admission of the EEOC investigative reports.

We know from an examination of the record that the district court gave careful consideration to the question of the admissibility of the EEOC investigative reports. We cannot say that it abused its discretion in excluding them.

Affirmed. Costs awarded to appellee.

United States Court of Appeals
For the First Circuit

No. 88-1654

WILLIAM B. SMITH,

PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, ET AL.,

DEFENDANTS, APPELLEES.

JUDGMENT

June 22, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is not here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, *Clerk.*

[cc: Ms. Franklin and Messrs. Lathrop and Sullivan]

United States District Court
District of Massachusetts

WILLIAM B. SMITH JUDGMENT IN A CIVIL CASE

v.

M.I.T. ET AL CASE NUMBER: 81-0058-N

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED.

JUDGMENT FOR THE DEFENDANT, M.I.T. et al.

March 2, 1988
Date

GEORGE F. McGRATH
Clerk

s/ CATHERINE S. LEHANE
(By) Deputy Clerk

(2)

No. 89-489.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

WILLIAM B. SMITH,
PETITIONER,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY AND
LINCOLN LABORATORY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

ROBERT E. SULLIVAN,*
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October 20, 1989

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Whether the First Circuit Court of Appeals correctly held that Petitioner's counsel, by his voluntary absence during the jury deliberations, waived whatever objection Petitioner may have had to supplemental jury instructions given in his absence.

2. Whether the First Circuit Court of Appeals correctly held that the jury instructions to which Petitioner objected for the first time on appeal did not rise to the level of plain error.

3. Whether the fact that the First Circuit Court of Appeals did not cite this Court's decision in *Price Waterhouse* as a basis for its conclusion that the jury instructions reviewed as a whole were not error, requires a remand of this case.

RULE 28.1 LISTING.

Lincoln Laboratory is part of the Massachusetts Institute of Technology. Massachusetts Institute of Technology has no parent companies, subsidiaries, or affiliates to list pursuant to Sup. Ct. R. 28.1.

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No. 89-489.

In the

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WILLIAM B. SMITH,
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v.

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RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

The Respondent, Massachusetts Institute of Technology ("MIT") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the First Circuit's decision in this case. That decision is reported at 877 F.2d 1106 (1st Cir. 1989) and is reproduced as an Appendix to the Petition for Certiorari ("Petition"), at A-1 through A-13.

Counterstatement of the Case.

After sixteen days of trial and final instructions to the jury in this age discrimination case, Petitioner William B. Smith's ("Petitioner") counsel left for vacation and was absent during the jury deliberations. In the course of these deliberations, the jury asked a series of questions to which the trial court responded. Petitioner's counsel, having chosen to be absent, made no objection to the trial court's open court response to the jury's question. On appeal to the First Circuit, Petitioner for the first time complained that the trial court's response was confusing to the jury. The First Circuit held that Petitioner's counsel had a duty under Rule 51 of the Federal Rules of Civil Procedure to inform the trial court of his objection at the time the instructions were given and that his voluntary absence constituted a waiver of any objection he may have had. In addition, the First Circuit held that the instructions as given were not plain error.

Petitioner sued MIT's Lincoln Laboratory ("the Laboratory") for age discrimination as a result of his termination from the Laboratory in 1978 when he was 47 years old. At the close of the evidence, the court instructed the jury on the appropriate method of proof of discrimination in a circumstantial evidence case in accordance with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). (App. Vol. II at 199-210). After giving these instructions the court called counsel to side bar and asked if there were any objections. Petitioner's attorney requested one correction, which the court agreed to make; he then stated "That's the only objection I have your honor". (App. Vol. II at 210). After the jury charge, Petitioner's counsel informed the court that he would be out of the state during the next week. (Transcript at 16-38 to 16-39). He did not make any arrangements for coverage by another attorney in his absence nor did he request any provision to allow him to respond to questions from the jury. (Transcript at 16-38 to 16-39).

Shortly after beginning its deliberations, the jury requested the instructions in writing. The court declined to provide written instructions, but did repeat the instructions on the method of proof. (App. Vol. II at 215 to 219). During this reinstruction, the court, without objection from Petitioner's now absent counsel, expanded the instruction to state that if Petitioner proved by direct evidence that discrimination was a motivating factor in his termination, then Respondent MIT had the burden of proving it would have terminated Petitioner absent the discrimination. (App. Vol. II at 219).

On its second full day of deliberations, the jury asked another question. (Transcript at 18-2). In a bench conference, noting that Petitioner's counsel was absent, the court said, "I have called counsel, and counsel representing plaintiff is unavailable. But my understanding is that he chooses not to be here, and again, I must continue without his presence. That's a fair statement." (Transcript at 18-2). The court went on to respond to the jury's question, and in its response included the direct evidence instruction it had previously given placing the burden of proof on Respondent MIT. (Transcript at 18-10).

On the next day of deliberations, the jury asked another question. Before addressing the substantive issue of the particular question, and while the jury was out of the courtroom, the court stated:

> I have a call — I have a communication from the jury. And I have notified your office and I have notified the other office but counsel for plaintiff is not available.
>
> And as I understood it, he was generally unavailable from the time deliberations started till [*sic*] now. And he indicated I believe that he was, you know, that the Court could carry on its business with or without his presence. He made no assignment of

> someone else to cover the jury deliberations process and the taking of the verdict. And so I have just concluded that consistent with his own intentions is that he is voluntarily absent from this period of time. And there was no request for any continuance or delay in the jury deliberations. And so I'm just assuming that he concedes his right to be here and that it does not proscribe my authority to continue to tell the jurors to come to a verdict and to take the verdict in his absence.

(Transcript at 19-2). The court then went on to deal with a question by a juror about the course of deliberations. (Transcript at 19-6 to 19-19).

On the last day of its deliberations, the jury asked a question and was reinstructed on the method of proof of a discrimination case. The court included the instruction that, after proof of discrimination by direct evidence, the burden of proof shifts to the employer to show that the same action would have been taken absent the discrimination. (App. Vol. II. at 224 to 225). The jury returned a verdict for MIT and Petitioner appealed.

The First Circuit Court of Appeals ruled, *inter alia,* that counsel's failure to be present when supplementary jury instructions were given constitutes a waiver of objections he may have had to those instructions. *Smith* v. *Massachusetts Institute of Technology*, 877 F.2d 1106, 1110 (1st Cir. 1989), Petition at A-6. The court further held that the Rule 51 duty to inform the trial court of any objection to the instructions as given to the jury was not discharged by Petitioner's counsel's statements to the trial court over the telephone prior to the actual instruction. *Id.* Finally, the First Circuit, after reviewing the instructions as a whole, held that the error assigned by Smith to the instructions in question did not rise to the level of plain error. *Id.*

Reasons for Denying the Writ.

This case presents no reason, compelling or otherwise, to grant the Petition for Writ of Certiorari. The First Circuit correctly held that Petitioner, by his voluntary absence throughout the period of jury deliberation, waived his after-the-verdict objection to supplementary instructions given in his absence. There is no split in the circuits concerning the application of Rule 51 of the Federal Rules of Civil Procedure to the facts of this case. Further, the First Circuit correctly found that the jury instructions, when read as a whole, did not rise to the level of plain error required to overcome the strictures of Rule 51. Finally, the mere fact that the First Circuit did not cite this Court's opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. , 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989), brought to the attention of the court by both Petitioner and Respondent, does not mean that the First Circuit failed to consider it in determining that the jury instructions did not constitute plain error.

I. There Is No Conflict Between the Circuits Presented by the Facts of This Case Where Petitioner's Counsel Waived His Objections to Supplementary Instructions Through His Voluntary Absence During Jury Deliberations.

Petitioner asks this Court to exercise its discretion and review this case on the ground of an alleged conflict between the circuits on the application of Rule 51 of the Federal Rules of Civil Procedure. Rule 51 requires that objections to jury instructions be made after the jury has been charged and before it retires to deliberate. Petitioner asserts that in a majority of circuits, counsel's expression of his views to the trial court over the

telephone, an expression not found anywhere in the record, would preserve his views of the applicable law for review on appeal. He presses this assertion even though the telephone call was made before, not after, the jury was charged. (Petition at 11). Neither logic nor the case law cited by Petitioner supports this assertion.

As a matter of logic, had Petitioner's counsel been present when the court supplemented its instructions to the jury, he would have had to make a record objection in order to preserve for appellate review the issue of the correctness of the supplemental instructions. Petitioner here should have no greater rights because his counsel chose not to be present to listen and object to the court's responsive instructions to the jury. There is no conflict between the circuits on the facts presented by this case. Petitioner's counsel's voluntary absence during the jury deliberations constitutes a waiver of any objection he might have had to supplemental jury instructions.

The facts presented by Petitioner exemplify the circumstance that Rule 51 was designed to avoid — that of a lawyer who is voluntarily absent during crucial jury instructions and later seeks to challenge those instructions as erroneous. The courts that have addressed this issue have found that counsel's absence during jury deliberations constitutes a waiver of his right to be there and to any objections he might have had. *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 390 (1888) ("The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasions may require, nor dispense with the necessity of reasonably excepting to his rulings and instructions nor give jurisdiction to a court of error to decide questions not appearing of record."); *see also McKnelly* v. *Sperry Corp.*, 642 F.2d 1101, 1108 (8th Cir. 1981); *Macartney* v. *Compagnie Generale Transatlantique*,

253 F.2d 529, 535 (9th Cir. 1958); *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940); *Skill* v. *Martinez*, 91 F.R.D. 498, 504-506 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982); *Hartol Petroleum Corp.* v. *Cantelou Oil Co.*, 107 F.Supp. 373, 377 (W.D.Pa. 1952).

In this case, the district court instructed the jury in open court after first finding that Petitioner's counsel had voluntarily chosen not to be there. (Transcript at 19-2). The First Circuit followed established case law when it ruled in the instant case that "[i]f supplementary instructions become necessary and counsel is not present, this constitutes a waiver of any objection to the supplemental instruction." 877 F.2d at 1109, Petition at A-6.

Petitioner's complaint here is that the trial court's instruction was confusing in that it contained elements of what Petitioner's counsel had requested and elements which he now claims favored the Respondent MIT. Petitioner is not complaining that the trial court rejected his view of the law, but rather of how the court articulated it. This is precisely the kind of case for which Rule 51 exists, since it is impossible for a party to know whether it has an objection to the court's articulation of the law until after that articulation is made. In effect, Petitioner asks this Court to engraft a "Monday morning quarterback" exception to Rule 51. Rule 51's main message, however, is "Speak now, or forever hold your peace." While it is true that an on the record objection, specifically made and specifically rejected, need not be ceremoniously repeated, the record must be clear that the objection was in fact made and rejected. *Estate of Larkins* v. *Farrell Lines, Inc.*, 806 F.2d 510, 515 (4th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987) (unrecorded objection during five and one-half hour conference afforded no basis for appellate review); *Whiting* v. *Jackson State University*, 616 F.2d 116, 126-127 (5th Cir. 1980) ("Even if an objection was made, it does not appear in the record on appeal; we

cannot review it"); *Eulo* v. *Deval Aerodynamics, Inc.*, 430 F.2d 325 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Hardware Mutual Insurance Company* v. *Lukken*, 372 F.2d 8, 13 (10th Cir. 1967).

The cases from other circuits cited by Petitioner involved circumstances in which there was a clear record of the party's objection regardless of whether it was made before or after the jury charge. *See Perkinson* v. *Gilbert/Robinson, Inc.*, 821 F.2d 686, 693 (D.C. Cir. 1987) ("The record establishes that plaintiff distinctly stated the grounds of her objection to the instruction on several occasions."); *Kakavas* v. *Flota Oceanica Brasileira, S.A.*, 789 F.2d 112, 120 (2d Cir.), *cert. denied*, 479 U.S. 853 (1986) (plaintiff's on the record request for a further charge, was sufficient to preserve the objection to the charge as given); *Powell* v. *Rockwell International Corp.* 788 F.2d 279, 285-286 (5th Cir. 1986) ("Because the record discloses that Rockwell made known its position to the judge that it was dissatisfied with the willfulness instruction, we find that it did not waive its right to pursue this claim at a later time."); *Bowley* v. *Stotler & Co.*, 751 F.2d 641, 647 (3d Cir. 1985) ("On this record it cannot seriously be contended that Bowley failed to preserve his objection to the incompleteness of the charge on control."); *United States* v. *Hollinger*, 553 F.2d 535, 543 (7th Cir. 1977) ("[S]pecific and distinct objections voiced in an earlier instruction conference held in the presence of a court reporter will be considered timely."); *Weir* v. *Federal Ins. Co.*, 811 F.2d 1387, 1391 (10th Cir. 1987).

In contrast to the cases cited by Petitioner, and as specifically found by the First Circuit, his counsel never made any record objection to the instruction he now assigns as error. 877 F.2d at 1109, Petition at A-5.[1] Thus, there was no basis for the

[1] Petitioner agrees that there is no record of his objection. *See* Petition at 11 n.3. Despite the fact that no record of his objection exists, however, Petitioner asserts, without a citation, that "[t]here is no question as to whether the court

First Circuit to review the objection to determine if the district court had been adequately apprised of the basis for the objection Petitioner allegedly made.

II. Petitioner Is Attempting to Raise a New Issue On Appeal.

Even if Petitioner's off the record telephone call were found to be sufficient under Rule 51 to preserve his objection to the supplementary instructions, this Court should deny his petition for writ of certiorari because he is now raising a new and different objection than the one he allegedly made by telephone. Petitioner asserts that the basis of the objection made by telephone was that the proper allocation of the burden of proof was as enunciated in *Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987). *See* Petition at 7 and 22. In *Fields* the First Circuit held that "[w]hen a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." 817 F.2d 831, 837 (1st Cir. 1987). Petitioner asserts that at trial he took the position that for him to prevail the alleged discrimination only had to be *a* motivating factor, as set out in *Fields*, rather than *the* motivating factor. (Petition at 7.) The court's supplementary charge tracked the language in the *Fields* case. (App. Vol. II at 224). Thus Smith received the instruction that he asked for, an instruction that was a correct statement of the law.

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fully understood the objection." Petition at 11. Finding such a citation would indeed be impossible, since without a record there is no way for an appellate court to determine whether the district court accurately understood and responded to the objection.

Since, subsequent to Petitioner's telephone "objection", the court gave an instruction that included the burden of proof language that Petitioner alleges he requested, Petitioner cannot, and no longer is, complaining that the jury instructions misstated the burden of proof. Instead, he now objects to the jury instructions as a whole on the ground that they were too confusing. *See* Petition at 23. This is a distinct objection that was not raised in any form at trial.[2] Therefore, under Rule 51, it cannot be raised for the first time in this petition for certiorari. *See McClow* v. *Warrior & Gulf Navigation Co.*, 842 F.2d 1250 (11th Cir. 1988) (objection regarding burden of proof cannot be raised upon appeal where only objection at trial was that instructions were in error as they related to issue of causation); *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1513-15 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985) (objection that instructions misstated relevant law cannot be raised upon appeal where only objection at trial was that issue should be decided by the court as a matter of law); *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439, 444-45 (8th Cir.) (Blackmun, J.), *cert. denied*, 368 U.S. 929 (1961) (objections of vagueness, indefiniteness, and confusion cannot be raised upon appeal where only objection at trial was that instructions misstated the law); *Hargrave* v. *Wellman*, 276 F.2d 948, 950 (9th Cir. 1960) (objection of no factual warrant for instruction cannot be raised upon appeal where only objection at trial was that instructions misstated the law). Since Petitioner failed at trial to object to the instruction as confusing, he may not raise that objection for the first time on appeal.

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[2] Nor could it have been, since counsel was not present at the time the supplementary instruction was given.

III. The Objection Raised by Petitioner For the First Time on Appeal Does Not Rise to the Level of Plain Error.

Petitioner asserts that the First Circuit should have reviewed the supplemental instructions even though he made no objection to them because the error he assigned to them constitutes "plain error." Although Rule 51 does not contain an explicit plain error exception to the requirement of a timely objection to jury instructions,[3] the First Circuit will review jury instructions even in the absence of strict compliance with Rule 51 in order "to prevent a clear miscarriage of justice" in "the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.), *cert. denied*, U.S. , 109 S.Ct. 392, 102 L.Ed.2d 381 (1988) (quoting *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966), *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), and C. Wright & A. Miller, Federal Practice and Procedure § 2558 at 675 (1971)). The First Circuit's formulation of the plain error rule is consistent with the rule articulated in the other circuits that have adopted the plain error exception. *See*, *e.g.*, *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1513-15 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Wright* v. *Farmers Co-Op of Arkansas & Oklahoma*, 620 F.2d 694, 699 (8th Cir. 1980); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 125 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973).

A party seeking appellate review of jury instructions for which no objection was made, bears a "heavy burden of demon-

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[3] Compare Rule 51 Fed. R. Civ. P. with Rule 52(b) Fed. R. Crim. P. which states "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

strating plain error." *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975). The plain error exception is limited to those rare cases where the error undermines constitutional guarantees, *Hunt* v. *Liberty Lobby*, 720 F.2d 631, 647 (11th Cir. 1983) (jury instructions contained wrong standard for proof of libel of a public figure); or where the instruction was an incorrect statement of the law and clearly resulted in an incorrect verdict, *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 541 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); or where the instructions provided the jury with no guidance and allowed them to reach a verdict through speculation or conjecture. *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, *supra* at 1517; *Morris* v. *Getscher*, 708 F.2d 1306, 1309-10 (8th Cir. 1983); *Cruthirds* v. *RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980).

In this case, Petitioner provides no support for his claim that this is an exceptional case warranting review under the plain error standard. He simply asserts that the charge, though accurately stating the law, was confusing. *See* Petition at 23. There is no evidence in this case that the instruction was confusing or that the jury was in fact confused. The instructions read as a whole accurately guided the jury in the method of proof in a discrimination case. Nor is there any evidence that the verdict was a miscarriage of justice. There was substantial evidence in this case, that Petitioner was a difficult, abrasive, nonproductive employee whose termination was not in any way related to his age. (*See*, *e.g.*, Transcript at 7-76, 7-78, 7-84, 12-22, 12-25, 12-26, 12-41, 12-42, 12-71, 12-72, 12-78, 12-79, 12-82, 12-89,). The First Circuit was correct in its judgment that there was no plain error in this case.

IV. There Is No Reason For Any Court to Revisit This Case For Consideration of *Price Waterhouse* v. *Hopkins*.

This Court should not grant Petitioner's request for certiorari, nor should it remand this case, simply because the First Circuit did not cite *Price Waterhouse* v. *Hopkins*, 490 U.S. , 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989) in its decision. *Price Waterhouse* was decided on May 1, 1989, the same day that the parties argued Petitioner's appeal before the First Circuit. As Petitioner points out (Petition at 10), both parties informed the First Circuit of the *Price Waterhouse* decision shortly thereafter. Seven weeks later, on June 22, 1989, the First Circuit affirmed the trial court's judgment. Its decision does not cite *Price Waterhouse*, a fact Petitioner equates with a failure to consider the case at all. Petitioner offers nothing else as evidence that the court failed to consider *Price Waterhouse*. Both parties agree, however, that the First Circuit was aware of the *Price Waterhouse* decision and that it was relevant to the correctness of the court's jury instructions in as much as it addressed the relative burdens of proof in a discrimination case.[4] There is, therefore, no reason to assume that Petitioner's appeal was not decided "under the hovering presence" of *Price Waterhouse*. *See Pauling* v. *Globe-Democrat Publishing Co.*, 362 F.2d 188, 198-99 (8th Cir. 1966) (Blackmun, J.), *cert. denied*, 388 U.S. 909 (1967). The First Circuit indicated that it had reviewed the jury instructions as a whole and as a result of that review was "not sure that the

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[4] *Price Waterhouse* adopted the standard of proof set out by the First Circuit in *Fields* v. *Clark University*, 817 F.2d 931, 936-937 (1st Cir. 1987), 490 U.S. , , 109 S.Ct. 1775, 1795, 104 L.Ed.2d (1989). Since the jury was instructed in accordance with *Fields* v. *Clark University*, the application of *Price Waterhouse* to these jury instructions would have resulted in a finding that the instructions were correct as a matter of law.

instruction was error at all."[5], 877 F.2d at 1110, Petition at A-7. Since the First Circuit reviewed the entire instruction after being made aware of the *Price Waterhouse* decision, there is simply no basis for Petitioner's claim that the First Circuit failed to consider it.

Conclusion.

The Petition for Certiorari should be denied.

Respectfully submitted,

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October 20, 1989

[5] The only possible relevance of *Price Waterhouse* to the First Circuit's decision in this case is in connection with its finding that the jury instructions did not constitute plain error. Having found against Petitioner on the Fed. R. Civ. P. 51 issues, the First Circuit had no further need to consider *Price Waterhouse*.